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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 FILOMENO NUNEZ, ET AL.,

5 Plaintiffs,

6 v.

7 13 CV 426 (DLC)

8 BISTRO NEW YORK DEVELOPMENT,  
9 INC., (d/b/a BISTRO NEW YORK),  
10 and JONG K. MOON

11 Defendants.

12 -----x  
13 New York, N.Y.  
14 June 7, 2013  
15 4:32 p.m.

16 Before:

17 HON. DENISE COTE,

18 District Judge

19 APPEARANCES

20 MICHAEL FAILLACE & ASSOCIATES, P.C.

21 Attorneys for Plaintiffs

22 BY: MICHAEL FAILLACE

23 LINA FRANCO

24 MATTHEW L. LEVINE, PLLC

25 Attorney for Defendants Bistro 369 Food Court; Leon Moore;  
George Jamieson

BY: MATTHEW L. LEVINE

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1 (In open court)

2 (Case called)

3 MR. FAILLACE: Good afternoon, your Honor. I'm  
4 Michael Faillace from Michael Faillace and Associates, and here  
5 with me is my associate, Lina Franco.

6 MR. LEVINE: Good afternoon, your Honor. Matthew  
7 Levine for the defendants, Bistro 369 Food Court; Mr. Moore and  
8 Mr. Jamieson.

9 THE COURT: Thank you.

10 MR. LEVINE: May I also inform the Court that counsel  
11 for Mr. Gutierrez is in the court, in the gallery.

12 THE COURT: And could you identify yourself for the  
13 record?

14 MS. SAYLOR: Elizabeth Saylor from Emery, Celli,  
15 Brinckerhoff and Abady for Mr. Gutierrez.

16 THE COURT: And if you want to come up, counsel, and  
17 take a seat, I'd appreciate it.

18 This is an order to show cause in an FLSA action, and  
19 I issued an order to show cause earlier this week after I was  
20 presented with a stipulation and proposed order with respect to  
21 a named plaintiff, Eduardo Gutierrez. In that proposed  
22 stipulation and order, which I signed on June 3rd, I was  
23 informed that Mr. Gutierrez had never agreed to participate in  
24 this action as a plaintiff and had never signed a retainer  
25 agreement with Mr. Faillace's law firm.

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1           It indicated further that he did not wish to be a  
2 plaintiff in this action, and that his name should be removed  
3 from the action. It indicated further that the Faillace firm  
4 relinquished all claims to attorney's fees with respect to this  
5 plaintiff. I was advised, through this stipulation, that  
6 Mr. Gutierrez is separately represented by the law firm Emery,  
7 Celli, and I appreciate that they're present here in this  
8 courthouse.

9           I signed the stipulation, but also that same day,  
10 June 3rd, perhaps the next day, June 4th, issued this order to  
11 show cause asking why plaintiff's counsel should not be  
12 sanctioned. One, a plaintiff was listed in the caption here  
13 who had not authorized the law firm to sue on his behalf.

14           Two, in a conference I held in this action, counsel  
15 for the defendants raised the issue of whether plaintiff's law  
16 firm actually did represent each of the plaintiffs it purported  
17 to be suing on behalf of. And during that conference,  
18 Miss Franco represented to me that she had personally  
19 interviewed each of the plaintiffs and obtained from each of  
20 them a retainer agreement and that plaintiff's counsel had  
21 retainer agreements for each of them.

22           In my order of June 4th, I recited various grounds on  
23 which plaintiff's counsel could be sanctioned, including Rule  
24 11, Rule 16 and, of course, this court's inherent powers to  
25 issue sanctions. I ordered this conference today so that

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1 plaintiff's counsel could have an opportunity to respond, and I  
2 ordered plaintiff's counsel to give notice to Mr. Gutierrez and  
3 his attorney, which has clearly been done. I believe we  
4 separately made an effort to notify Mr. Gutierrez's counsel.

5 So Mr. Faillace?

6 MR. FAILLACE: Your Honor, this, as you've discussed,  
7 your Honor, is a very unfortunate situation. Mr. Gutierrez  
8 came to our office on January 7th. He interviewed with  
9 Ms. Lina Franco, who had just started working in my office. He  
10 was not the only one there. He came with other individuals.

11 Now, the procedure we follow in my office is the  
12 clients come, they interview with us, and then they sign the  
13 retainer agreement right in the next office next door to where  
14 they're being interviewed. The confusion that Ms. Franco had  
15 is that she has the interview, she interviewed him. We have a  
16 record of that interview, and because she was new, she thought  
17 that the retainers were being done as she had seen them being  
18 done, right away right that day.

19 What she didn't know was that our office manager, who  
20 immediately takes care of the retainers, right as we finish the  
21 interviews, had left to go to the dentist that day, and we have  
22 that in our record. We can show, your Honor, that Mr. Pedro  
23 Polanco had left that day to go to the dentist. Due to that  
24 confusion, she thought he had signed it, and like everybody  
25 else who came, signed right after the interview.

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1                   Unfortunately, he didn't sign and then never came back  
2 to sign. So, you know, then she wrote the complaint assuming  
3 he had signed, didn't know he hadn't signed, and then when  
4 she -- when she came here, she had the vision that he signed  
5 the agreement. Now, your Honor, we recognize it was a mistake  
6 and we apologize. Miss Franco was new in this. She just  
7 started working for us. She had never practiced before; so it  
8 was right at the beginning of her learning curve and, you know,  
9 she's very concerned and, you know, feels very bad about it.

10                  She immediately agreed with Mr. Levine, when he  
11 complained. We have e-mails here to prove it, that we  
12 immediately removed Mr. Gutierrez from our chart. We agreed to  
13 remove him from the case and so, you know, we never fought that  
14 in any way. So, you know, there hasn't been any harm to  
15 anybody in this. Just an unfortunate situation, your Honor.

16                  And, you know, to a certain extent, you know, I take  
17 some responsibility because I wanted Ms. Franco to learn, and  
18 that's why I was giving her the responsibility that usually I  
19 had, of interviewing people and making sure they did the --  
20 they signed the retainers, because usually that's what I do.  
21 But I wanted her to get into the business and learn and meet  
22 the clients and, you know, just learn what we do, and so I gave  
23 her that day that responsibility.

24                  So basically, your Honor, I mean, we have to accept  
25 that, you know, we made a mistake. It's an unfortunate

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1 mistake, but in no way did we -- and, you know, and Miss Franco  
2 was convinced the gentleman had signed, but she was very  
3 willing to take him off. And, you know, we have -- you know,  
4 that's why we signed that stipulation because we in no way  
5 wanted to have any problem.

6 One thing I wanted to raise, your Honor, was that  
7 after many of my clients had signed their retainers, I got a  
8 call from the owner of the business, who told me they  
9 weren't -- you know, the clients didn't want to be in the case,  
10 and that he had talked to them. And I spoke to one of them,  
11 and his name is Alejandro, and he said, don't pay attention,  
12 we're just telling -- you know, we're just letting him -- you  
13 know, saying yes to him for him to leave us alone and let us  
14 work. The owner was pressuring my clients to get out of the  
15 case, and one of them was --

16 THE COURT: Mr. Faillace?

17 MR. FAILLACE: Yes.

18 THE COURT: Mr. Faillace, that's not the purpose of  
19 today's conference.

20 MR. FAILLACE: Okay. Your Honor, I was just  
21 explaining why there was some confusion. The clients told us  
22 on the phone they wanted to stay in the case.

23 THE COURT: Are you telling me that Mr. Gutierrez told  
24 you on the phone that he wanted to stay in the case?

25 MR. FAILLACE: Mr. Sanchez told me, don't worry,

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1 Mr. Faillace, we're just following him along. We're just --  
2 you know, we're just saying yes, yes to everything he says for  
3 him to leave us alone. That's what he said to me, and I can  
4 bring Mr. Sanchez here, and he will testify to that.

5 He told me on the phone because Mr -- I forget his  
6 name, Lynn somebody, was calling me and telling me, Oh, your  
7 clients don't want to be in the case. I said, Put my clients  
8 on the phone, please. And so he put Mr. Sanchez on the phone,  
9 and he said, don't pay attention. We're just following the  
10 line. We're just saying yes to him.

11 THE COURT: Well, Mr. Faillace, I wanted to stay on  
12 the topic here, which is your law firm's listing of  
13 Mr. Gutierrez as a plaintiff when you should not have, your law  
14 firm's representation to this Court that you had a retainer  
15 agreement for him or from him when you did not have that.

16 Let me ask you, Ms. Franco.

17 MS. SAYLOR: Yes, your Honor.

18 THE COURT: You made your representation to me on  
19 April 19th that you had a retainer agreement for all the  
20 plaintiffs. When did you learn that you did not have a  
21 retainer agreement from Mr. Gutierrez?

22 MS. SAYLOR: I learned on April 11th, after I received  
23 counsel's e-mail -- counsel's letter on April 11th letting us  
24 know to keep -- to preserve engagement agreements. So I asked  
25 our paralegal for such agreements, and I realized we didn't

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1 have an agreement from Mr. Gutierrez. And I said, Why? Did we  
2 have something saying that he was not in the case? I can't  
3 remember what our paralegal said, but I immediately -- I have  
4 an e-mail here from -- dated April 11th also, right after I  
5 received correspondence from Mr. Levine, saying we have removed  
6 Eduardo Gutierrez from our charges.

7 And this is before our meeting with your Honor on  
8 April 19th; so this was a week before. And to be completely  
9 honest, your Honor, I thought it was a moot issue. I had  
10 already told Mr. Levine that Mr. Gutierrez wasn't in the case.  
11 I have all the e-mails proving that. As a matter of fact, your  
12 Honor, I sent numerous e-mails. I sent another one April --  
13 numerous e-mails telling him Mr. Gutierrez is not in the case,  
14 Mr. Gutierrez is not in the case, because I couldn't find a  
15 retainer. And I wanted an affidavit from Mr. Gutierrez saying  
16 he's not in the case and we couldn't get ahold of  
17 Mr. Gutierrez. So yes, your Honor --

18 THE COURT: So --

19 MS. SAYLOR: Yes, your Honor.

20 THE COURT: Ms. Franco, I have a problem with your  
21 chronology here. The conference with me was, I believe,  
22 April 19.

23 MS. SAYLOR: That's correct, your Honor, and for  
24 that --

25 THE COURT: So it was after you learned you didn't

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1 have a retainer agreement for Mr. Gutierrez and, yet, you  
2 represented to me that you had personally met with all of the  
3 plaintiffs, including Gutierrez, and you had a retainer for all  
4 of them.

5 MS. SAYLOR: Well, your Honor, I thought we had  
6 retainers for all of them, and I thought we were talking about  
7 the people that I had -- you know, I thought I had already  
8 discussed this issue with defendant's counsel. I thought that  
9 we had already said that we were going to remove Eduardo  
10 Gutierrez. So when I represented to you that we had retainers,  
11 my understanding was it was the retainers of everybody else.  
12 As Michael Faillace said, I was new, you know. I assumed. I  
13 misspoke.

14 THE COURT: Now, Mr. Faillace, is this the only case,  
15 let us say, in the last six months filed in a court, state or  
16 federal, in which this kind of issue has been raised?

17 MR. FAILLACE: Without any doubt, yes, your Honor,  
18 yes.

19 THE COURT: Mr. Faillace, pause before you answer  
20 that.

21 MR. FAILLACE: I can't recall any case where this has  
22 happened to me, your Honor.

23 THE COURT: Mr. Levine?

24 MR. LEVINE: Yes, your Honor. I would like to add a  
25 couple of facts to this record because I think they're

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1 important for you to consider. The first one is a small one,  
2 but I think it relates to the second one. The first one  
3 relates to this hearing this afternoon. Despite your Honor's  
4 clear order that they notify Mr. Gutierrez's counsel about it,  
5 they did not notify them until an hour and a half before the  
6 hearing. I have the e-mail to prove it. Small thing, maybe,  
7 maybe not because of the second thing I'm going to tell you.

8 After our conference, your Honor, at Miss Franco's  
9 invitation, I sought the retainer letter for all of the  
10 plaintiffs she had assured your Honor. I remember as well,  
11 that she had one for Mr. Gutierrez specifically. She also had  
12 written that to me in an e-mail on April 11th. I pressed them  
13 for it. They said yes, yes, we'll get it for you. They  
14 delayed it.

15 On May 10th, the following happened. Pedro Pilanco,  
16 in Mr. Faillace's firm, called Mr. Gutierrez on his cell phone  
17 and said the following, this is the conversation: "You signed a  
18 paper on January 7th, didn't you?" Mr. Gutierrez responded to  
19 him, "No, I didn't. You know that." He said to Mr. Gutierrez,  
20 Mr. Pilanco, "Well, do you want to be in this lawsuit? Because  
21 if you don't, you're going to have to pay the fees and you're  
22 going to be in big trouble." Mr. Pilanco did not tell the  
23 amount of fees. Mr. Gutierrez said, "Well, I'm going to have  
24 to consult an attorney about this." Mr. Pilanco responded,  
25 "Well, it's up to you whether you decide to proceed with this

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1 lawsuit, but if you don't," again he said, "you're going to be  
2 in big trouble and you're going to owe a lot of money for the  
3 fees incurred up to this point."

4 Your Honor may want to ask Ms. Saylor about that,  
5 whether she can confirm that. I can give you a declaration  
6 from my legal assistant, who was on the phone with  
7 Mr. Gutierrez shortly after this call with Mr. Pilanco  
8 occurred. And I have also a photograph of a call from  
9 Mr. Pilanco's phone number, which is the same exchange as  
10 Mr. Faillace's.

11 So I think Mr. Faillace's statement to you that they  
12 never did anything after April 11th is completely wrong, it's  
13 inaccurate, it's misleading. In fact, they tried to get him to  
14 come and sign something to get him into the lawsuit because  
15 they knew several days later Ms. Franco was going to give you  
16 the retainer letters. And, indeed, she did several days later.  
17 All of them had been signed except that she had nothing from  
18 Mr. Gutierrez.

19 So, your Honor, I think you need to know those facts  
20 as you go forward in your decision.

21 THE COURT: I'm sorry, I didn't take down the name of  
22 the attorney from Emery Celli, counsel's name.

23 MS. SAYLOR: Elizabeth Saylor, S-a-y-l-o-r.

24 THE COURT: Ms. Saylor, is there anything that you  
25 want to add?

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1 MS. SAYLOR: I can confirm that Mr. Gutierrez  
2 consulted with us because he had received a call from the  
3 plaintiffs' law firm telling him that if he did not participate  
4 in the lawsuit, that he would be responsible for fees and would  
5 be in big trouble. And that was his concern, so he came to us  
6 to consult regarding what his legal rights were there.

7 And he did say that he had never signed a retainer.  
8 His memory, as he told me, was that he had spoken to them on  
9 the phone but that he had not agreed to participate in the  
10 case.

11 THE COURT: Thank you, Miss Saylor.

12 MR. LEVINE: Your Honor, I'm sorry. I had one thing I  
13 forgot to tell you. I apologize. May I?

14 THE COURT: Yes.

15 MR. LEVINE: Mr. Faillace, apparently, also spoke to  
16 Mr. Gutierrez. The call he was referencing after my client  
17 first got served because my client put Mr. Gutierrez on the  
18 phone, and Mr. Gutierrez, according to an affidavit he signed  
19 before I was in this case, told Mr. Faillace that he never  
20 agreed to be part of this lawsuit; that when Mr. Faillace  
21 insisted he work for a company different than my client's  
22 company, Mr. Gutierrez told him, no, I don't work for that  
23 company. And Mr. Gutierrez said, I'm surprised to learn my  
24 name is included in the caption of the case, Bistro New York  
25 Development versus Jong Moon, which is also in this caption in

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1 this court. I apologize for not describing that before.

2 THE COURT: And, Mr. Levine, when did that  
3 conversation occur?

4 MR. LEVINE: The conversation occurred, I believe,  
5 sometime in mid-February, I believe February 14th appears to be  
6 the date, of 2013.

7 THE COURT: Mr. Faillace?

8 MR. FAILLACE: Your Honor, I again repeat. I recall  
9 that conversation, and Mr. Gutierrez may be saying what he  
10 saying now, but in that conversation he and Mr. Sanchez assured  
11 me, don't pay attention, just -- you know, we're in the case.  
12 You know, don't worry about it. We're just, you know,  
13 following him along so that he let's us do our work.

14 If Mr. Gutierrez wants to change his story now, you  
15 know, I'm left -- I can't, you know, say anything. But I do  
16 recall having had that conversation because it was Mr. Lynn who  
17 put him on the phone because he was talking to me saying, oh,  
18 these guys don't want to be in the case. Well, put them on the  
19 phone. Let them tell me that.

20 And Mr. Gutierrez and the other gentleman said, don't  
21 worry about it, we're just following him along. You know,  
22 we're just saying yes to him. So I stand behind my story, your  
23 Honor, because I do recall that occasion and both gentlemen  
24 told me don't worry, don't worry, don't worry

25 MS. FRANCO: Your Honor, may --

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1                   THE COURT: Now, Mr. Faillace, you told me just  
2 moments ago about a conversation you had with someone other  
3 than Mr. Gutierrez. You didn't mention that Mr. Gutierrez was  
4 on the phone at that time.

5                   MR. FAILLACE: Okay. Your Honor. I remembered the  
6 name Alejandro Sanchez. I remember having spoken to the people  
7 who still work in the place, and I remembered because Alejandro  
8 has come back to me and said, we told you that.

9                   Now, Mr. Gutierrez now changes the story, but I do  
10 recall having had those conversations that day, and had  
11 Mr. Gutierrez told me I don't want to be in the case, I would  
12 have done something right away, but that's not what he told me,  
13 your Honor. I have total memory about it, your Honor. They  
14 did not tell me we don't want to be on the case. The clients,  
15 on the phone, said, you know, just don't pay attention.

16                  THE COURT: So why didn't you promptly notify  
17 Ms. Saylor of today's conference?

18                  MR. FAILLACE: Your Honor, that I have to take  
19 responsibility for my office. I thought my office had taken  
20 care of that. You know, I sincerely thought it was being taken  
21 care of and I -- you know, I did not know it hadn't been done.

22                  THE COURT: When did you give instructions for that to  
23 happen?

24                  MR. FAILLACE: I didn't because my office receives the  
25 ECF; so they have the responsibility of doing it right when

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1       they get the ECF.

2               THE COURT: So you never gave any instructions?

3               MR. FAILLACE: I mean, your Honor, I can find that --  
4 I don't recall giving the instructions because in my office,  
5 your Honor, the associates take responsibilities of the cases.  
6 They get the ECF, and they take action based on the ECFs. I  
7 don't have to give them instructions on everything that  
8 happens.

9               MS. FRANCO: Your Honor, if I may? I will take the  
10 blame for this. I've been at depositions all week. We are  
11 short staffed right now. Josh, our other coworker, the other  
12 attorney in the office, thought that I sent it. I didn't send  
13 it because I completely forgot. I reminded him of it when I  
14 got back to the office after the depositions today, and he sent  
15 it immediately.

16               THE COURT: Let me ask you just one more time,  
17 Mr. Faillace. In the last six months, has any judge raised  
18 with you or your law firm that you have named as plaintiffs or  
19 people who have authorized you to sue on their behalf who  
20 purportedly joined lawsuits that you filed, have you  
21 represented to any court that you were authorized to act on  
22 their behalf and that has been challenged by either one of the  
23 plaintiffs or by defense counsel?

24               MR. FAILLACE: Honestly, your Honor, not to my  
25 recollection. If it happened, it didn't happen to my

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1 knowledge. So I honestly do not recall having had that  
2 problem. I've had different problems with clients not showing  
3 up to settlement conferences and we're having to drop the case,  
4 because the client didn't show up in a case with Judge Forrest,  
5 but that's not because anybody challenged that they were in the  
6 in case.

7 And we had another case that a client, after filing  
8 the lawsuit, asked us to drop the lawsuit because he had  
9 decided on his own that he didn't want the lawsuit. But I  
10 don't recall any case where there has been a challenge because  
11 somebody who was in the lawsuit wasn't in the lawsuit or had  
12 not signed up. I don't have any recollection of that. If  
13 there is such a case, I'd love -- you know, I'd be interested  
14 to hear which one is it because I'm sure I can clarify that.

15 THE COURT: So, Mr. Faillace, I don't know if you want  
16 to put in anything in writing. I'm not requiring you to. I'm  
17 going to reserve decision based on this record. Do you want an  
18 opportunity to put in something in writing or no?

19 MR. FAILLACE: Your Honor, I don't know. I can't  
20 see -- I mean, we -- you know, let's say yes, your Honor. Can  
21 I change my mind?

22 THE COURT: Absolutely. Miss Franco, you should feel  
23 free, if you want to put in something in writing, you may, as  
24 well. I'll give you two weeks. That would be June 21st, and  
25 if you're not going to submit anything, I would appreciate a

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1 letter advising me of that so that I know the issue is ripe for  
2 me to make a final decision about it.

3 MS. FRANCO: Okay. Your Honor.

4 THE COURT: Excuse me, Miss Franco?

5 MS. FRANCO: I said okay, your Honor.

6 Your Honor, one more thing. It's also interesting to  
7 note that Mr. Gutierrez was speaking with other plaintiffs. He  
8 was promoted to assistant manager two weeks after he came to  
9 our office. It's just an interesting fact to note.

10 THE COURT: Actually, Miss Franco, I'm not sure you  
11 fully comprehend what's happening here, based on that  
12 statement.

13 MS. FRANCO: Perhaps, your Honor.

14 THE COURT: The issue is whether plaintiff's counsel  
15 can be relied upon. You listed someone as a plaintiff in a  
16 lawsuit, in the caption of a lawsuit where you were not  
17 authorized to do so. You made a representation to me, in  
18 person, when you were specifically questioned about it because  
19 defense counsel raised the issue. You assured me you had a  
20 retainer agreement for Mr. Gutierrez.

21 Based on what you've told me today, at the conference,  
22 you knew you did not. Today you told me that the conference  
23 was on April 19th; that on April 11th, you learned you didn't  
24 have a retainer agreement for him. Nonetheless, you advised me  
25 on April 19th that you did.

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1                   Now, as an officer of the court, you have a  
2 responsibility to make sure any document you file is accurate,  
3 to make sure that any oral representation you make to the Court  
4 is accurate. These are serious matters. Do you understand me,  
5 Miss Franco?

6                   MS. FRANCO: Yes, your Honor.

7                   THE COURT: Thank you, everyone, for participating  
8 today.

9                   (Adjourned)

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